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August 3, 2007

Hon. Scott McDowell
Judge, 62nd Judicial District
Lamar County Courthouse
Paris, Texas 75460

RE: Cause No. 76357

Dear Judge McDowell:

This firm has been retained to represent the interest of the alleged and un-named "subscriber" the subject of an agreed order in Cause No. 76357 filed in your court.

My review of the so-called Agreed Order is that the un-named subscriber must "file a responsive pleading, opposition, intention to oppose or otherwise challenge disclosure of his name or address" or the information will automatically be provided to Plaintiff's counsel. An Agreed Order requires the consent of the Defendant.

Please accept this letter as an opposition or at least an intention to oppose the release of this constitutionally and statutorily protected confidential information. This letter is in no way a responsive pleading, answer, or an appearance in the lawsuit filed in this cause against John Does to which there has been absolutely no service or citation.

From my review of this Agreed Order if such opposition is not filed then the constitutionally and statutorily protected information will be automatically disclosed without the subscriber having any procedural safeguards. I will address later that this is patently illegal, unconstitutional and an abuse of process.

The issue at hand is the disclosure of "personally identifiable information" which is the term and the definition the subject of 47 USC §551. Identity and address of a subscriber is such information to which the above-described Act applies. To require the subscriber to file a responsive pleading whereby he would obviously identify himself would be to allow an end-run around the very Act itself. In other words the subscriber would have to identify himself so he could lodge a protest to the disclosure of his identity. Such a result would be absurd and in direct contravention of the Act and the stated purpose of the Act. Therefore, this letter is not a responsive pleading but is an "opposition" as provided in the so-called "Agreed Order". I will address later that I see nothing in Texas or federal jurisprudence which provides for such an odd procedure. Surely a statutorily

protected subscriber would not have to reveal his identity to successfully prevent the revelation of that very same identity.

Underlying Lawsuit and Ex Parte Order

A pleading was filed by Plaintiff PRMC and included was a "Motion to Non-Party to Disclose Information". The petition alleges that this motion is made pursuant to §551(c), Title 47 of the United States Code. Thereafter, this court signed an ex parte order granting the relief and ordering Sudden Link "who is not a party to this action" to divulge the very information that §551(c) (the Act) prevents and for which civil penalties of up to \$1,000 per day as liquidated damages are provided.

Ex Parte Order

There is absolutely no legal or procedural rule under Texas law or federal law which allows such an order to be obtained. This suit is an unverified petition with no supporting affidavits against unnamed parties for which there has been no citation. I challenge the Plaintiff to cite a single legal authority which sanctions ex parte relief in such situations.

The only ex parte relief in Texas Civil Procedure is that involving a Temporary Restraining Order and those require verified pleadings, posting of a bond, and citation. This is not a Temporary Restraining Order. This is some made up procedure that the Court has somehow accepted.

47 USC §551 (The Cable Communications Act)

The Plaintiff in its pleadings states that this request is made pursuant to this Act. The Agreed Order sets out a procedure that is supposedly pursuant to this very same Act. I can only conclude that this Court was under the impression that this Act authorized and sanctioned such disclosures and implementation of such procedures. Nothing could be farther from the truth. In fact, the stated purpose of this Act was to protect the identity of the subscribers. In fact, the heading for the §551 in the Act is "Protection of Subscriber Privacy". The Act in no way creates a vehicle for obtaining subscribers' information. What the Act does say is that a cable operator is liable for disclosing this information unless it is pursuant to a valid court order. It does not create a remedy of a court order in situations like this. The Act simply states that a cable operator is liable unless there is a valid court order. The Plaintiff has somehow taken this language and tried to infer that the Act creates a mechanism of securing such a court order. It does not.

The Plaintiff is arguing that this language creates a procedure. It is a truism that a cable operator must comply with a court order. That cannot be read into sanctioning ex parte court orders to get the very information that the Act is designed to protect. For the Plaintiff to retrieve this information

it would have to have a valid court order under some law which would authorize the release of this information (i.e. the Patriot Act). This Act does not create that; it simply recognizes that if there is valid court order then the cable operator is not liable for the disclosure. But you must first have a valid court order.

Interestingly, under the Act for the government to obtain subscriber information in a criminal investigation they must first present "clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity..." Therefore, in a criminal case the government must offer "clear and convincing evidence" of a crime before it can attempt to get this information. But, the Plaintiff is arguing that a hospital in a civil case can get such information with an unverified and vague allegations of defamation. Under the Plaintiff's position, PRMC would have more access to such than the Homeland Security Agency. This is illogical and is an abuse of the Act.

For the Court's convenience I have attached a copy of the Act. The Court can clearly see there is no such procedure outlined in this Act. The Act is a shield and not a sword.

In *Santellana v. Nucentrix Broadband Networks, Inc.*, 211 F Supp 2nd 848, in discussing the Cable Communications Act the Federal District Court stated "the Act protects the privacy of cable subscribers and provides a privately enforceable remedy for violations".

Agreed Order

After the entry of the ex parte order it appears that PRMC and Sudden Link entered into an "Agreed Order". Neither party had the right to enter into any type of order that had the effect of abrogating the subscriber's rights as defined in the Act. The Act does not allow the cable operator to enter into such agreements at the expense of its subscriber.

Perhaps Sudden Link will argue that this Agreed Order was better than immediate release as called for by the ex parte order that had been entered by this Court. Regardless, all parties need to be aware that the procedures utilized here are in violation of federal law as detailed in the Act which provides for substantial civil penalties. In addition to the violations of this Act such disclosures violate the rights of privacy as afforded by the U.S. Constitution as well as the Texas Constitution. These arguments do not even address the obvious First Amendment implications there are from the sort of suit that is being pursued by the Plaintiff in this action.

The Agreed Order with all its time periods and deadlines reads as if it is tracking some federal procedure or statute. It clearly is not. The Plaintiff cannot unilaterally and by ex parte means rewrite the Cable Communications Act and provide a cause of action and a hybrid form of disclosure that even the Justice Department would not have if investigating criminal behavior. Certainly the Act did not create an exception for a hospital wanting to fend off criticisms regarding its management.

This letter does not even address the very thin allegations of alleged defamation and other causes of action in the petition. A careful reading of the petition would show that there is not anything that would come close to per se defamation or any other type of cause of action. However, such an analysis is not even relevant because they are not entitled to this information anyway.

Procedure

There is no such procedure in Texas and federal jurisprudence for what is taking place in this case. I find no legal authority for a subscriber having to take this sort of action. There has not even been citation on anybody in this case.

I challenge anybody involved in this case to show any precedent for employing such a procedure as this. The Court improvidently granted ex parte relief and I invite the Court to rectify this action by immediately rescinding all orders. The so-called Agreed Order is nevertheless an ex parte order as Sudden Link is not a party to this action. If Plaintiff wants to make Sudden Link a party then it should do so by amending its pleadings and then showing the Court any type of legal authority which would require the disclosure of this information. The Cable Communications Act certainly does not provide such an authority.

In conclusion, the Act has already been violated. The subscriber has suffered harm through the artifice of this rogue procedure. The Court should review the ex parte orders and the Act and conclude there is absolutely no authority for the entering of such and there is certainly no authority for the implementation of such a procedure that requires the subscriber to take this sort of action to protect its rights when it has not even been made a party to any type of suit. In short, this action supposedly made pursuant to the Act is in reality, a violation of the very same Act.

If any additional information is needed, please advise.

Sincerely yours,

James R. Rodgers

JRR/bjs
cc: R. Wesley Tidwell
J. Michael Tibbals